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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 398

TREASURE COMPANY, a corporation, and SAMARKAND OIL COMPANY, a corporation,

Petitioners and Appellants,

vs.

UNITED STATES OF AMERICA, for the use of RECONSTRUCTION FINANCE CORPORATION, a Federal corporation, acting in behalf of DEFENSE PLANT CORPORATION, a Federal Corporation,

Respondent and Appellee.

Petition for Writ of Certiorari and Brief in Support Thereof.

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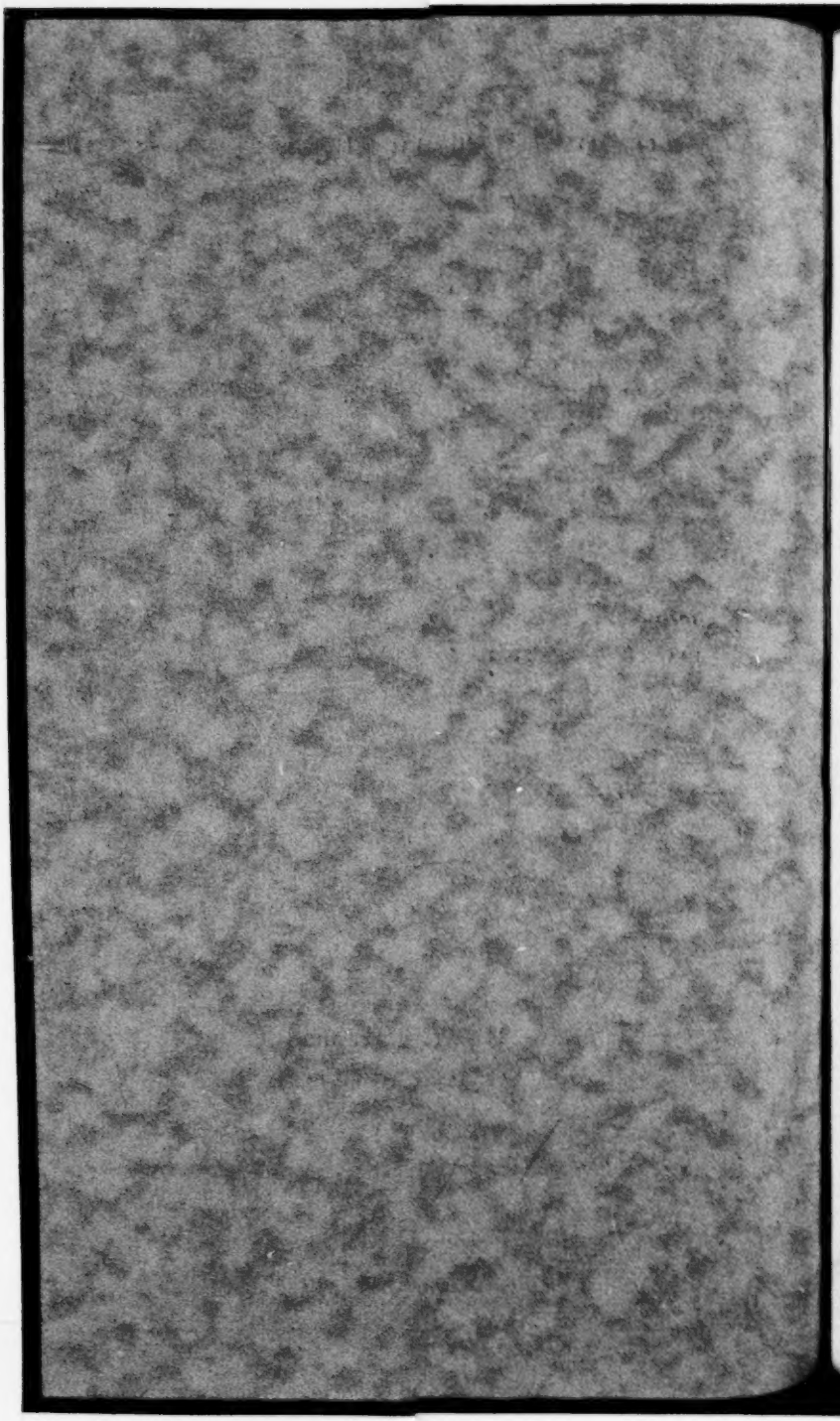

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UNITED STATES OF AMERICA, for the use of RECONSTRUCTION FINANCE CORPORATION, a Federal corporation, acting in behalf of DEFENSE PLANT CORPORATION, a Federal Corporation,

Respondent and Appellee.

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of Treasure Company, a corporation, and Samarkand Oil Company, a corporation, respectfully petition this Honorable Court for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Statement of Matters Involved.

The only issue presented to this court is whether the United States Court of Appeals for the Ninth Circuit erred in not holding that the District Court of the United States, for the Southern District of California, Central

Division, abused its discretion in entering its order of August 4, 1947, in that certain condemnation action No. 2454-B, Civil, then pending before said District Court, wherein petitioners herein were two of the defendants and respondent herein was plaintiff. By said order the District Court denied petitioners' motion of May 28, 1947, for an order vacating the order made by said District Court on January 27, 1947 [R. p. 185], whereby petitioners herein were restrained from prosecuting two actions in the Superior Court of the State of California, in and for the County of Los Angeles, commenced September 27, 1945, against the Union Oil Company, a corporation, being cases entitled: Treasure Company, a corporation, vs. Union Oil Company of California, a corporation, No. 505-967, and Samarkand Oil Company, a corporation, vs. Union Oil Company of California, a corporation, No. 505-968, to recover possession of, or the value of certain personal property [R. p. 170] which personal property was seized and taken into possession by the United States Marshal and by him forthwith delivered to the Union Oil Company on September 28, 1942 [R. pp. 243-4], said District Court not having acquired jurisdiction over said personal property until the filing of an amended complaint in said condemnation action on January 12, 1944. [R. pp. 31-46.]

The facts set forth in the opinion of the Circuit Court of Appeals are entirely in accord with those above stated, in that the opinion declares that certain real and personal property was taken by the United States Marshal on September 28, 1942, and that the Union Oil Company had possession of all of the property claimed by petitioners herein at all pertinent times since September 28, 1942, and

that the actions Nos. 505-967 and 505-968 sought the alternative relief of possession of said personal property, or its value, and that the personal property described in said actions Nos. 505-967 and 505-968 did not become a part of the *res* in the condemnation action until the filing of the amended complaint therein on January 12, 1944.

Footnotes 7 and 8 of such opinion point out that the personal property described in Actions 505-967 and 505-968 was that portion of the personal property involved in the condemnation action which was not described in the prior claim and delivery actions 489-318 and 489-319, mentioned in the opinions.

The fact that the personal property described in said court actions Nos. 505-967 and 505-968 was taken possession of by the Marshal on September 28, 1942, and immediatly delivered by him to the Union Oil Company appears from the statement made by Mr. Lieberman, counsel for Union Oil Company and Reconstruction Finance Corporation, made in open court upon the proceedings had in the District Court upon the hearing of respondent's petition for an injunction on June 10, 1946. At that time and place the following occurred:

> "The Court: Mr. Lieberman, before you go I want to ask you a question. By the asking of it I don't want you to think that I am doing it in an argumentative way at all, or that I am taking any position, but just for enlightenment, that is all.
>
> The first taking was in November, 1943, I believe you stated?

M. Lieberman: September 28, 1942.

The Court: What is it?

Mr. Lieberman: September 28, 1942 was actual physical taking, and the date of the decree of possession. January, 1944, was the first time—

The Court: What was the date in November?

Mr. Lieberman: November is the date they brought suit.

The Court: All right. I don't want that. Let me get this—

Mr. Lieberman: November, 1943, is the date they brought suit."

(This refers to the prior state court actions 489-318 and 489-319.)

"The Court: Wait just a minute. When was the actual taking of the personal property?

Mr. Lieberman: September 28, 1942, personal and real were taken on that date.

The Court: When the amendment made to the complaint?

Mr. Lieberman: January, 1944, the amendment which specified the personal property. January, 1944.

Mr. Weymann: January 12, 1944.

The Court: There was a period there of a year and some months. Now, during that time the possession was taken by the marshal; is that correct?

Mr. Lieberman: That is correct.

The Court: And the property was delivered to the Union Oil Company?

Mr. Lieberman: He turned it over to R. F. C., and they immediately turned it over to Union Oil Company." [R. pp. 243-4.]

The opinion of the United States Court of Appeals concedes that the District Court abused its discretion in rendering the order of August 4, 1947, if the making of the order of January 27, 1947, was prohibited by Section 265 of the Judicial Code (28 U. S. C. A. 379) but held that Section 265 of the Judicial Code which prohibits a Federal Court from enjoining the prosecution of State Court actions was not applicable to State Court Actions Nos. 505-967 and 505-968, because they involved property which was a part of the *res* in the condemnation proceedings at the time of the commencement of said State Court actions and the prosecution of such State Court actions would impair the jurisdiction of the District Court over such part of the *res* in the condemnation action and therefore the District Court did not abuse its discretion in denying petitioners' motion to dissolve the injunction restraining the prosecution of the State Court actions.

The ownership by the respective plaintiffs of the personal property described in State Court Actions Nos. 505-967 and 505-968 in so far as such personal property is involved in the condemnation action 2454-B, Civil, is concerned appears from the captions of the various portions of the inventory referred to in Paragraphs XIII and XIV of the amended complaint in condemnation and filed as a supplement thereto.

The caption of the portion of the inventory covering the property taken from Samarkand Oil Company is as follows:

"Union Oil Company of California
Inventory of Materials and Supplies Taken Over by
Defense Plant Corporation—September 29, 1942.
SAMARKAND OIL COMPANY
Samarkand Well #1." [R. p. 87.]

The caption of the portion of the inventory covering the property taken from Samarkand Oil Company as not being needed in the Playa Del Rey project is as follows:

"Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project.
SAMARKAND." [R. p. 97.]

The caption of the portion of the inventory covering the personal property taken from Treasure Company is as follows:

"Union Oil Company of California
Inventory of Materials and Supplies Taken Over by
Defense Plant Corporation—September 29, 1942.
TREASURE(R) OIL COMPANY
2600 Washington Blvd., Venice, Calif." [R. p. 101.]

The caption of the portion of the inventory covering the property taken from Treasure Company as not being needed in the Playa Del Rey project is as follows:

"Items Deleted from Original Inventory as Indicated
as Not Being Needed in Playa Del Rey Project
Treasure" [R. p. 108.]

It is clear from this that the respondent herein concedes the ownership by Treasure Company and Samarkand Oil Company of the property described in the portions of the inventory above referred to.

The illegality of the taking being clearly established by the fact that the Marshal seized the personal property described in State Court Actions Nos. 505-967 and 505-968 and delivered the same to Union Oil Company prior to the adoption of any resolution by Reconstruction Finance Corporation determining the necessity of taking such personal property and when the condemnation suit only covered land, and prior to the filing of the amended complaint in the condemnation action on January 12, 1944, which first sought to condemn personal property, no further proceedirgs in the District Court are required to establish the ownership or the wrongful taking of the personal property by the Marshal and its unlawful withholding by Union Oil Company, as hereinabove set forth.

The wrongful taking of the personal property having occurred prior to the filing of the amended complaint in condemnation, no award can be made in the condemnation action for the loss, deterioration or rental of such personal property which occurred or accrued prior to the filing of the amended complaint in the condemnation action on January 12, 1944, which first sought to condemn personal property.

It is obvious that the only judgments which can be had in Actions Nos. 505-967 and 505-968 are money judgments. This is so for the reason that the federal court having acquired jurisdiction of the personal property before the commencement of the State Court Actions Nos. 505-967 and 505-968 the state court could not thereafter render a valid judgment therein in favor of plaintiffs against Union Oil Co. for possession of such personal property.

Counsel for respondent herein has at no time disputed the statement in our opening brief in the United States Court of Appeals that the prosecution of the State Court Actions Nos. 505-967 and 505-968 will probably terminate in only money judgments rather than judgments for the possession of the property described in the complaints in said actions. The award of such money judgments would not impair or defeat the jurisdiction of the District Court over any part of the *res* in the condemnation action. Therefore the United States Court of Appeals erred in holding that the District Court did not abuse its discretion in entering the order of August 4, 1947, whereby it refused to vacate the order of January 27, 1947, restraining the prosecution of Actions 505-967 and 505-968, for it thereby prevented petitioners herein from proceeding to the trial of said last mentioned actions until after the trial of the condemnation action which was commenced September 28, 1942, over six years ago and has not yet been brought to trial.

This Court Has Jurisdiction.

This case involves an important question of Federal law which has not, but should be, settled by this court. (240a of the Judicial Code, 28 U. S. C. A. 347, now new title 28 United States Code, Judiciary and Judicial Procedure, Section 1254, Supreme Court Rule No. 38, Par. 5-B.)

This court has never decided whether it is error for the Court of Appeals to hold that it is not an abuse of discretion for the District Court to refuse to vacate an order granting an injunction restraining the prosecution of actions brought in a state court for the recovery of the possession or value of personal property, which personal property has been seized by the United States Marshal and delivered to a private corporation, before the filing of an amended complaint in a pending condemnation action whereby such personal property is for the first time made a part of the *res* in such condemnation action.

It is true that this court has held in *Toucey v. New York Life Ins. Co.,* 86 L. Ed. 100, that the Federal Court will restrain the prosecution of a state court action *in rem* if the Federal Court has first acquired jurisdiction of the *res,* but will not do so if the state court action be one *in personam* involving the question of personal liability only, or if the enforcement of any valid state court judgment will not disturb the custody of the Federal Court. (*Riehle v. Margolis,* 73 L. Ed. 669; *Denner-Greely Valley etc. Assn. v. McNiel,* 131 F. 2d 67.)

It has never decided whether an injunction will lie to restrain the prosecution of a state court action for claim and delivery in which relief is sought in the alternative

for the possession or value of the property and it appears that it will be impossible to render an effective judgment in the state court actions for the possession of such personal property.

It being apparent that the taking of the personal property by the Marshal and turning it over to Reconstruction Finance Corporation and by Reconstruction Finance Corporation to Union Oil Company before the filing of the amended complaint in the condemnation action, by which it was first sought to condemn such personal property was unlawful (*Barker v. Kansas City,* 70 P. 2d 5), and that no compensation could be awarded in a condemnation action for the loss, deterioration or rental of the personal property which occurred or accrued prior to the filing of the amended complaint (*United States v. Miller,* 87 L. Ed. 366), the granting of the injunction of January 27, 1947, even though modified by the order of May 22, 1947, making the injunction effective only until further order of the court, only served to protract the state court actions and this court has held that a writ of certiorari should be allowed if its denial would result in merely unnecessary protracting litigation. (*Speller v. Atchison, T. & S. F. Ry.,* 64 L. Ed. 810.)

The Question Presented.

The injunction of January 27, 1947, having been improperly issued the United States Court of Appeals erred in holding that the District Court did not abuse its discretion by entering the order of August 4, 1947, refusing to vacate the injunction of January 27, 1947.

Reasons Relied Upon for Allowance of the Writ.

1. The personal property described in State Court Actions Nos. 505-967 and 505-968 not having been a part of the *res* of the condemnation action on September 28, 1942, when said personal property was seized by the United States Marshal and by him delivered to the Union Oil Company of California, such seizure, delivery and retention were illegal.

2. No award can be made in the condemnation action for the loss, deterioration or rental of the personal property which occurred or accrued prior to the filing of the amended complaint in the condemnation action on January 12, 1944, whereby said personal property first became a part of the *res* in the condemnation action, because such award must be based only on the value of the property at the time that it first became a part of the *res* in the condemnation action.

3. The filing of the amended complaint in the condemnation action gave the United States District Court such exclusive jurisdiction over the personal property described in the subsequently commenced State Court Actions Nos. 505-967 and 505-968 as to vest paramount right to possession of such property in the United States and precluded the rendition of a judgment for possession in such state court actions.

4. The plaintiff in the condemnation action having acquired on January 12, 1944, the paramount right to the exclusive possession of the personal property described in State Court Actions Nos. 505-967 and 505-968, the state court in those actions could render no effective judgment for possession of the personal property, but plain-

tiffs' remedy would be limited to a money judgment against Union Oil Company for the unlawful taking and withholding.

5. The provisions of Section 265 of the Judicial Code (28 U. S. C. A. 378) are applicable to State Court Actions Nos. 505-967 and 505-968, because only money judgments can be rendered in such actions and the enforcement of such judgments will not disturb the custody of the personal property by the United States District Court and hence the District Court erred in granting the temporary injunction of January 27, 1947, and abused its discretion in refusing to vacate such injunction.

6. Certiorari will lie to review the judgment of the United States Court of Appeals which unnecessarily protracted the trial of said state court actions in that it holds that the District Court did not abuse its discretion in refusing to vacate the injunction restraining the trial of the state court actions although such injunction was improperly granted.

Respectfully submitted,

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IN THE

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Respondent and Appellee.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 169 Fed. 2nd 437. The opinion is also printed in full in the record. [Vol. II, p. 289 *et seq.*]

Jurisdiction.

The jurisdiction of this court is invoked under Section 248 of the Judicial Code, 28 U. S. C. A. 347, now new Title 28, U. S. Code, Judiciary and Judicial Procedure, Section 1254.

The United States Court of Appeals has in this case decided an important question of federal law which has not been, but should be, settled by this court. (Supreme Court Rule 38, 5-B.)

Certiorari will lie to review an order which has the effect of unnecessarily protracting litigation. (*Spiller v. Atchison, Topeka & Santa Fe R. R. Co.*, 64 L. Ed. 810.)

The judgment of the United States Court of Appeals was entered in this case on August 6, 1948.

Statement of the Case.

On September 18, 1942, Reconstruction Finance Corporation adopted a resolution for the condemnation of the land described in the original complaint in an action in condemnation commenced by the United States of America on September 28, 1942, being Case No. 2454-B in the District Court of the United States, Southern District of California, Central Division, by which action it was sought to condemn land only for the establishment of a gas storage reservoir. [R. p. 5.]

Said action was commenced under the provisions of 15 U. S. C. A. 601-617, 50 U. S. C. A. 631-632 and Ex. Order No. 9217. [R. p. 5.]

The declaration of taking [R p. 21] and the order for immediate possession dated September 28, 1942 [R. pp. 14-19], were likewise confined to land.

On or about September 28, 1942, the United States Marshal, armed with the order for immediate possession of land, seized the personal property located on the land described in said complaint in condemnation, and delivered the personal property to Union Oil Company [R. p. 244] as agent for Defense Plant Corporation.

The Union Oil Company thereupon, at the direction of Defense Plant Corporation, prepared an inventory of such personal property which was headed as follows:

> "INVENTORY OF THE PROPERTY AND EQUIPMENT REFERRED TO IN PARAGRAPHS XIII, XIV AND XV OF THE FIRST AMENDED COMPLAINT FILED HEREIN, AND WHICH IS TO BE ACQUIRED BY CONDEMNATION IN THE ABOVE ENTITLED ACTION."

In such inventory appears a list of items headed "Items Deleted From Original Inventory as Indicated as Not Being Needed in Playa Del Rey Project" [Tr. pp. 97 to 100, incl.] in reference to appellant Samarkand's property and as to Treasure Company's property at transcript pages 108 to 118, inclusive.

No resolution was adopted by the Reconstruction Finance Corporation for the condemnation of any personal property until October 4, 1943. [R. pp. 81-82.] This resolution speaks of the power of the Defense Plant Corporation to acquire property by condemnation. It is to be noted that the Defense Plant Corporation was never vested with such power or authority.

On January 12, 1944, an amended complaint was filed in the condemnation action whereby it was first sought to condemn the personal property involved in State Court Actions 505-967 and 505-968. [R. pp. 47-51.]

On September 27, 1945, petitioners filed separate actions Nos. 505-967 and 505-968, against the Union Oil Company in the Los Angeles County Superior Court to recover the possession or value of the personal property located on September 28, 1942, on the land sought to be condemned and in which petitioners had a leasehold interest [R. p. 71] and which personal property was not

included in the prior actions brought by petitioners against Union Oil Company, being Cases Nos. 489-318 and 489-319.

On January 27, 1947, pursuant to petition of the United States of America, the District Court granted a temporary injunction restraining the prosecution of State Court Actions Nos. 505-967 and 505-968. [R. pp. 171-175.]

On August 4, 1947, the United States District Court denied the motion of the petitioners herein to vacate the temporary injunction of January 27, 1947. This petition is filed to obtain a review of the decision of the United States Court of Appeals which affirmed the last mentioned order.

It is the position and contention of the petitioners herein that the United States of America by virtue of the filing of the amended complaint in the condemnation action which described the personal property described in the claim and delivery Actions Nos. 505-967 and 505-968 obtained a paramount right to the exclusive possession of such personal property as of January 12, 1944, and thereafter, such right was binding on all of the world and, therefore, no judgment for possession can be rendered in the last mentioned state court actions, but the remedy of the plaintiffs therein will necessarily be limited to money judgments for damages. The enforcement of such judgments will not disturb the possession of said personal property by the United States District Court in connection with the pending condemnation action.

Moreover, any award made in the condemnation action would necessarily be limited to the value of the personal property at the time of the filing of the amended complaint therein on January 12, 1944, and could not include compensation for damages arising from the loss and deterioration of such personal property between September 28, 1942, and January 12, 1944, nor for the rental thereof during said period, because the possession during said period was unlawful.

It necessarily follows that the District Court erred in granting the injunction of January 27, 1947. Such being the case this petition must be granted for the United States Court of Appeals in its opinion concedes that the District Court abused its discretion in making the order of August 4, 1947, denying petitioners' motion to vacate the injunction of January 27, 1947, if such injunction was prohibited by the provisions of Section 265 of the Judicial Code.

Certiorari will lie to review an order which unnecessarily protracts litigation.

Error Relied Upon.

The United States Court of Appeals for the Ninth Circuit erred in holding that the United States District Court did not abuse its discretion in making the order of August 4, 1947, denying the motion of petitioners herein for an order vacating the temporary injunction granted January 27, 1947, restraining the prosecution of the State Court Actions Nos. 505-967 and 505-968.

ARGUMENT.

I.

The Personal Property Described in State Court Actions Nos. 505-967 and 505-968 Not Having Been a Part of the Res of the Condemnation Action on September 28, 1942, When Said Personal Property Was Seized by the United States Marshal and by Him Delivered to the Union Oil Company of California, Such Seizure, Delivery and Retention Were Illegal.

We have shown in detail under the statement of the case that neither the resolution of the Reconstruction Finance Corporation authorizing the commencement of the condemnation Action No. 2454-B, Civil [R. p. 77], nor the declaration of taking [R. pp. 20-21] nor the order for immediate possession [R. pp. 14-19] nor the original complaint in condemnation [R. p. 5], made any reference to personal property. The property described in the State Court Actions Nos. 505-967 and 505-968 was seized by the Marshal on September 28, 1942 [R. pp. 243-4], wholly without any order authorizing such seizure, and no attempt to condemn personal property was made in said action until the adoption of the amendatory resolution on October 4, 1943. [R. pp. 81-82.] The amended complaint, which first sought to condemn personal property, was not filed until January 12, 1944. [R. pp. 47-51.]

50 U. S. C. A. 632, subdivision 2 (Title II, 2nd War Powers Act), provides as follows:

> "Upon and after the filing of the condemnation petition, immediate possession may be taken and the

property may be occupied, used, and improved for the purposes of this Act (this section and section 171 of Title 50), notwithstanding any other law."

In *Barker v. Kansas City et al.*, 70 P. 2d 5, the court, in holding that the failure to make a determination of the necessity prior to the institution of the condemnation action rendered the proceedings void, said at pages 15 and 16:

> "The general rule in condemnation proceedings is that there should be a finding or declaration of a necessity for the taking of the private property for a public use, and that conditions precedent to the exercise of the power of eminent domain must be complied with or the proceeding will be void (20 C. J. 888)."

In *City of Los Angeles v. Glassell,* 203 Cal. 44, the court said at page 46:

> "The statutory authority must be strictly pursued, and every condition or other prerequisite to the exercise of jurisdiction be observed, especially every requisite of the statute having the semblance of benefit to the landowner . . . (20 Corpus Juris, pp. 882, 883)."

It necessarily follows that the seizure of the personal property on September 28, 1948, was illegal and all proceedings had in respect to the personal property prior to January 12, 1944, were void.

II.

No Award Can Be Made in the Condemnation Action for the Loss, Deterioration or Rental of the Personal Property Which Occurred or Accrued Prior to the Filing of the Amended Complaint in the Condemnation Action on January 12, 1944, Whereby Said Personal Property First Became a Part of the Res in the Condemnation Action, Because Such Award Must Be Based Only on the Value of the Property at the Time That It First Became a Part of the Res in the Condemnation Action.

It is conceded in the opinion of the Court of Appeals that personal property did not become a part of the *res* in the condemnation action until the filing of the amended complaint in said action on January 12, 1944, some fifteen months after the seizure of the property on September 29, 1942. Under such circumstances the award made by the District Court in the condemnation action must be limited to the value of the personal property on January 12, 1944, and no allowance can be made for the loss or deterioration which occurred or for the rental which accrued between September 28, 1942, and January 12, 1944.

The rule is stated in *United States v. Miller,* 87 L. Ed. 336, at page 343 as follows:

> "Respondents correctly say that value is to be ascertained as of the date of taking."

In *Loomis v. City of Augusta,* 99 P. 2d 988, the court said at page 990:

> "In proceedings to condemn land, . . . no damages are included except such as necessarily arise

from a lawful taking and a proper construction and operation of the improvement. Anticipated or past negligence in the construction of the improvement is not therefore an element of damage."

See also:

Block v. United States, 160 F. 2d 604.

It is obvious from these authorities that the award in the condemnation action must be predicated on the value of the personal property at the time that the United States District Court first acquired jurisdiction of the personal property, namely, January 12, 1944.

III.

The Filing of the Amended Complaint in the Condemnation Action Gave the United States District Court Such Exclusive Jurisdiction Over the Personal Property Described in the Subsequently Commenced State Court Actions Nos. 505-967 and 505-968 as to Vest Paramount Right to Possession of Such Property in the United States and Precluded the Rendition of a Judgment for Possession in Such State Court Actions.

Condemnation proceedings are action *in rem* and are binding on the whole world.

In *Bayle-Lacoste & Co. v. Superior Court,* 46 Cal. App. 636, the court, in discussing the nature of condemnation actions, said at page 642:

"A condemnation action is a proceeding *in rem.* The filing of the complaint, and not the issuance of summons, vests the court with jurisdiction. Juris-

diction of the subject matter is not conferred by consent of the parties."

Condemnation actions being actions *in rem* are binding on the whole world.

This is pointed out in *Lee v. Silva,* 197 Cal. 364, in which case the court said at page 368:

> "Strictly speaking, an action *in rem* proceeds only against property seized and sought to be held for the satisfaction of an asserted charge against property without regard to the title of individual claimants to the property."

In *Todd v. Rogers,* 198 N. W. 945, the court, in holding that proceedings in condemnation are binding on all persons whether they are parties or not, said at page 946:

> "It is a proceeding *in rem,* and binds all persons interested in the *rem,* although not technically parties to the proceedings."

See:

State of Minnesota v. United States, 125 F. 2d 636.

It is clear from this that an interest paramount to that of the condemnor cannot be acquired by anyone after the filing of the complaint or amended complaint by which property is first sought to be condemned.

IV.

The Plaintiff in the Condemnation Action Having Acquired on January 12, 1944, the Paramount Right to the Exclusive Possession of the Personal Property Described in State Court Actions Nos. 505-967 and 505-968, the State Court in Those Actions Could Render No Effective Judgment for Possession of the Personal Property, but Plaintiffs' Remedy Would Be Limited to a Money Judgment Against Union Oil Company for the Unlawful Taking and Withholding.

In *Financial Ins. Corp. v. Brockton,* 96 Cal. App. 179, an action was brought in claim and delivery for the possession of an automobile or its value. Upon the commencement of the trial it was stipulated that plaintiff had obtained possession under process issued by authority of the court and that it had sold the automobile which was of the value of $1200. The court rendered judgment for the defendant Lasker Corporation against the plaintiff for the value of the automobile. Upon appeal the plaintiff contended that the judgment was erroneous because it was not in the alternative. In rejecting this contention the court said at page 182:

> "It is therefore clear that at this time appellant is in no position to complain of the form of the judgment in that regard."

In *Nahhas v. Browning,* 181 Cal. 55, plaintiff, the owner of a harvesting outfit, brought an action on a replevin bond executed by the defendant Browning as

principal and his two sureties. The outfit was destroyed by fire while in Browning's possession. The jury returned a verdict for the value of this property and the loss of its use. Upon defendant's motion the court reduced the verdict to the value of the property. The plaintiff appealed. The Supreme Court in holding that the property having been destroyed the plaintiff in the action on the replevin bond was entitled to the same damages as he would have been entitled to had the replevin action proceeded to trial, namely, judgment for the value of the property and damages for its withholding, said at page 57:

> "A return of the property could not have been had in the replevin suit here in question. Had that action been carried to judgment, defendants, plaintiffs herein, would, therefore, have been entitled to a judgment for the value of the property, not as damages for its conversion, but as a substitute for and in lieu of the property, and would in addition have been entitled to a judgment for damages for the taking and withholding the property."

In *Foster v. Fernandes,* 205 Cal. 128, plaintiff brought an action to recover possession of certain cattle and had judgment for the possession of the cattle or for their value if possession could not be had. The evidence showed that defendant had wrongfully taken the cattle from the plaintiff and thereupon disposed of them to innocent third persons before the commencement of the replevin action. The court, in holding that only a money judgment should

have been rendered and in modifying the judgment accordingly, said at pages 132-3:

> "The evidence is abundantly sufficient to support the finding that the Fernandes had no interest in the cattle; that they unlawfully took possession of the same and disposed of them to innocent parties prior to the commencement of this action. Under the proof the court should have granted the relief which the evidence called for, by entering a judgment in favor of the plaintiff and against the defendants Fernandes for the value of the cattle in the amount found by the jury to be their value at the time of the conversion, to-wit: $2,250, with interest from the date of the conversion (sec. 3336, Civ. Code), but without damages for detention."

See also:

Erreca v. Meyer, 142 Cal. 308;

Moskowvitz v. Le Francois, 121 Cal. App. 310 (holding that a judgment for possession in a claim and delivery action is improper if judgment for possession cannot be enforced).

It follows that no valid judgment can be rendered in the State Court Actions Nos. 505-967 and 505-968 for the possession of the personal property described in the complaints in said actions.

V.

The Provisions of Section 265 of the Judicial Code (28 U. S. C. A. 378) Are Applicable to State Court Actions Nos. 505-967 and 505-968, Because Only Money Judgments Can Be Rendered in Such Actions, and the Enforcement of Such Judgments Will Not Disturb the Custody of the Personal Property by the United States District Court nor Plaintiff's Exclusive Right to the Possession Thereof, and Hence the District Court Erred in Granting the Temporary Injunction of January 27, 1947, and Abused Its Discretion in Refusing to Vacate Such Injunction.

Section 265 of the Judicial Code provides in part as follows:

> "379. (Judicial Code, section 265.) Same; stay in State courts. The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy. (R. S. 720; Mar. 3, 1911, c. 231, 265, 36 Stat. 1162.)"

In the case of *Toucey v. New York Life Ins. Co.*, 86 L. Ed. 100, the court, in speaking of the exceptions to Section 265, said at page 108:

> "We find, therefore, that apart from congressional authorization, only one 'exception' has been imbedded in Sec. 265 by judicial construction, to wit, the *res* cases. The fact that one exception has found its way into Sec. 265 is no justification for making another."

And at page 106:

> "The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from

> a court of the other jurisdiction is a rule of right and of law based upon necessity, and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam,* involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

The action of the United States Court of Appeals in holding that the United States District Court did not abuse its discretion in making the order of August 4, 1947, refusing to vacate the temporary injunction of January 27, 1947, was predicated entirely upon the proposition that the prosecution of State Court Actions Nos. 505-967 and 505-968 would impair the jurisdiction of the District Court over the part of the personal property described in State Court Actions Nos. 505-967 and 505-968 and from that premise the United States Court of Appeals concluded that the District Court properly held that Section 265 of the Judicial Code was not applicable to State Court Actions Nos. 505-967 and 505-968. The United States Court of Appeals was clearly in error in so holding, for we have seen that the prosecution of the State Court actions cannot result in any valid or effective judgment which will in anywise disturb the possession of the United States District Court. Under such circumstances it was error to enjoin the prosecution of the State Court actions.

In *General Baking Co. v. Harr,* 81 L. Ed. 730, the petitioner sought a writ of certiorari to review an order made by the Court of Appeals dismissing a petition filed in the District Court to establish a trust in the funds on deposit with Franklin Trust Company and directing that the matter be referred to the State Court. The dismissal was predicated on the assumption that the State

Court had exclusive jurisdiction of the matter because the State Secretary of Banking had taken charge of the assets of the Franklin Trust Company under the state law. The United States Supreme Court, in reversing such order of dismissal because the proceedings in the Federal Court would have not disturbed the possession of the state officer or of the State Court, said at page 732:

> "It was error for the Circuit Court of Appeals to hold that the District Court was without jurisdiction of the controversy. It should have passed on issues properly presented upon the appeal."

In *Bryant v. Atlantic Coast Line R. Co.,* 92 F. 2d 569, the court held that the Federal Court will restrain the prosecution of a State Court action which will disturb prior acquired possession and jurisdiction of the Federal Court, but that such injunction will not lie if the proceedings of the State Court will not disturb the possession of the Federal Court.

In this connection the court said at page 570:

> "The decisions so holding are legion; though even in that situation the federal court may not enjoin suits to declare the rights of claimants to the *res,* if they do not and cannot disturb its custody."

The decision in *Bryant v. Atlantic Coast Line R. Co., supra,* was based on the decision in *Commonwealth Trust Co. v. Bradford,* 80 L. Ed. 920. In the last mentioned case the trustee of a mortgage pool created by the trust department of the Pittsburgh National Association sought a writ of certiorari to determine the jurisdiction of the District Court to pass upon the right of the receiver of the bank to the proceeds of the pool, the District Court action having been commenced for that purpose after the

trustee had been appointed by the State Court for the purpose of winding up the affairs of the bank. The court, in holding that the jurisdiction of the District Court did not interfere with the prior acquired jurisdiction of the State Court because a judgment in the Federal Court would not disturb the possession in the State Court, said at pages 924-5:

> "The original bill revealed that the Receiver had been denied participation as a *cestui que* trust in the assets held by petitioner Trust Company, and asked an adjudication of his rights therein. He did not seek direct interference with possession or control of the assets; he prayed that his right to partake thereof be determined.
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> "The jurisdiction of Federal Courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interests therein. Such proceedings are not *in rem;* they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution."

See *Riehle v. Margolies,* 73 L. Ed. 669, to the same effect.

In *Denver-Greeley Valley etc. Assn. v. McNeil,* 131 F. 2d 67, the bondholders of a drainage district brought an action in the Federal Court in which judgment was rendered for the amount due on the bonds and which judgment directed the drainage district officer to levy assessments and assign tax sale certificates to the clerk of the court. Thereafter an action was brought in the State Court by the property owners in the district seeking a

judgment requiring the bondholders to accept previously issued interest coupons in payment of the assessment and to have the tax certificate adjudged void. The bondholders procured an order of the United States District Court enjoining the prosecution of the State Court action. The property owners took an appeal from this order. The Court of Appeals, in reversing the judgment because different issues were involved and the two courts were not seeking custody either actual or potential of the same thing at the same time, said at pages 71-72:

> "The jurisdiction of the federal court has not been invoked for the purpose of determining these issues. The lands situated in the irrigation district upon which the special assessments were delinquent were sold in accordance with the law of Colorado. The tax sale certificates were issued and delivered to the irrigation district in conformity with the law of Colorado. The question of whether interest coupons may be used to pay such special assessments and to redeem the tax sale certificates must be determined by the law of Colorado. The mere fact that the tax sale certificates are held by the clerk of the federal court for the benefit of the judgment creditors does not deprive appellants of their right to have a state court of competent jurisdiction adjudicate these issues.
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> . . . . . .
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> "We are not confronted with a situation where courts of concurrent jurisdiction are attempting to exercise jurisdiction over the same subject matter. Neither are we confronted with a situation where courts of concurrent jurisdiction seek to obtain possession or custody, either actual or potential, of the

same thing at the same time. The trial of the issues raised in the state court would not result in a conflict with the federal court over possession or control of the tax sale certificates."

So in the present case the issues in the condemnation action and State Court Actions Nos. 505-967 and 505-968 are distinctly different. In the condemnation action the issue is whether or not the United States is entitled to acquire the personal property described therein for use in connection with the establishment and maintenance of a gas storage reservoir. The issue of possession in the State Court actions is eliminated by the filing of the amended complaint in the condemnation action leaving as the sole issue in those actions the question of whether or not the Union Oil Company should be required to compensate the plaintiffs therein in money for the wrongful taking of their personal property.

It clearly appears from these authorities that the United States District Court erred in granting the injunction of January 24, 1947. The District Court having erred in granting such injunction the United States Court of Appeals erred in finding that the District Court did not abuse its discretion in denying petitioners' motion to vacate such injunction, for the Court of Appeals in conceding that the District Court abused its discretion in denying the motion to vacate the injunction if the injunction was erroneously granted, said:

"Therefore the District Court might be said to have abused its discretion in making and entering the order of August 4, 1947, if appellants' contention that the order of January 27, 1947, was prohibited by Par. 265 were accepted as correct."

VI.

Certiorari Will Lie to Review the Judgment of the United States Court of Appeals Which Unnecessarily Protracted the Trial of Said State Court Actions in That It Holds That the District Court Did Not Abuse Its Discretion in Refusing to Vacate the Injunction Restraining the Trial of the State Court Actions Although Such Injunction Was Improperly Granted.

We have seen under Point I that the seizure of petitioners' personal property on September 28, 1942, was unlawful and the authorities cited under Point II make it clear that no compensation can be procured in the condemnation action for the loss or deterioration which occurred or the rent which accrued between September 28, 1942, and January 12, 1944. It appears from pages 87 to 108 of the record that the title to the property involved in the condemnation action and described in State Court Actions Nos. 505-967 and 505-968 was and is owned by the petitioners herein. It further appears that the only valid judgments which can be rendered in those State Court actions are money judgments, the enforcement of which will not impair the jurisdiction or custody of the District Court over any part of the *res* in the condemnation action. Under such circumstances a further delay in the trial of the State Court actions is wholly unnecessary and certiorari will lie to review the order of the Circuit Court of Appeals to the effect that the District Court did not abuse its discretion in refusing to vacate the injunction.

In *Spiller v. Atchison, T. & S. F. R. Co.*, 64 L. Ed. 810, plaintiff recovered a judgment in the District Court in accordance with the reparation order made in plaintiff's favor by the Interstate Commerce Commission. Upon

appeal the Circuit Court reversed the judgment of the District Court and remanded the cause to the District Court with directions to grant a new trial. The Supreme Court, in holding that it would grant a writ of certiorari and review the record to determine whether the evidence was sufficient to sustain the judgment of the District Court rather than to protract the litigation to the extent necessary to reach a final judgment by means of a new trial, said at page 815:

> "However, upon consideration of the particular circumstances of the case, we have concluded that a writ of certiorari ought to be allowed, without further protracting the litigation to the extent that would be necessary in order to reach final judgments; the transcript of the record and proceedings returned in obedience to the writs of error to stand as the return to the writ of certiorari."

Undoubtedly the writ of certiorari will lie to obviate the unnecessary delay in litigation.

Conclusion.

The only effective or valid judgments which can be rendered in the State Court Actions Nos. 505-967 and 505-968 are money judgments against the Union Oil Company for the value of the personal property wrongfully taken by it on September 28, 1947, and for its rental since said time. The enforcement of these judgments will not disturb the possession of the United States District Court of any of the property over which it acquired jurisdiction by the filing of the amended complaint in the condemnation action on January 12, 1944. No award can be made in the condemnation action for any loss or deterioration which

occurred or rent which accrued between September 28, 1942, and January 12, 1944.

It necessarily follows that the District Court erred in granting the injunction of January 27, 1947, and the United States Court of Appeals erred in holding that the District Court did not abuse its discretion in refusing to vacate the temporary injunction restraining the prosecution of State Court Actions Nos. 505-967 and 505-968. The writ of certiorari must be granted to correct this error.

Respectfully submitted,

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